No. 77-832

In the Supreme Court of the United States

OCTOBER TERM, 1977

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, PETITIONER

v.

FIRST LINCOLNWOOD CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

RONALD R. GLANCZ,
MARK N. MUTTERPERL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	4
Reasons for granting the petition	8
Conclusion	14
Appendix A	1a
Appendix B	13a
Appendix C	15a

CITATIONS

Cases:

BHCo., Inc., 60 Fed. Res. Bull. 123 (1974)	13
Citizens Bancorporation, 61 Fed. Res. Bull. 805 (1975)	13
Clayton Bancshares Corporation, 50 Fed. Res. Bull. 1261 (1964)	13
Denver U.S. Bancorporation, Inc., 56 Fed. Res. Bull. 291 (1970)	12
First Sebanco, Inc., 57 Fed. Res. Bull. 687 (1971)	13
Michigan National Corporation, 58 Fed. Res. Bull. 804 (1972)	12
Mid-Continent Bancorporation, 52 Fed. Res. Bull. 198 (1966)	13
Midwest Bancorporation, Inc., 56 Fed. Res. Bull. 948 (1970)	13

Cases—Continued

	Page
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367	13
Starbuck Bancshares, Inc., 62 Fed. Res. Bull. 450 (1976)	13
The Grand Banks Corporation, 57 Fed. Res. Bull. 1003 (1971)	13
Udall v. *Tallman*, 380 U.S. 1	13
Whitney National Bank v. *New Orleans Bank*, 379 U.S. 411	12, 14

Statutes and regulations:

Banking Act of 1933, Section 19, 48 Stat. 186	11
Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U.S.C. 1841 *et seq.*:	
Section 2(a), 12 U.S.C. 1841(a)	4
Section 3, 12 U.S.C. 1842	2, 5, 8
Section 3(a), 12 U.S.C. 1842(a)	3, 4
Section 3(b), 12 U.S.C. 1842(b)	13
Section 3(c), 12 U.S.C. 1842(c)	3, 4, 10, 13
Section 5, 12 U.S.C. 1844	13
Section 9, 12 U.S.C. 1848	6
Bank Holding Company Act Amendments of 1966, 80 Stat. 236	11
12 U.S.C. 26	13
12 U.S.C. 27	13
12 U.S.C. 78	13
12 U.S.C. 222	13
12 U.S.C. 248(a)	13
12 U.S.C. 301	13
12 U.S.C. 322	10, 13

Statutes and regulations—Continued

	Page
12 U.S.C. 371b	13
12 U.S.C. 461	13
12 U.S.C. 601	13
12 U.S.C. 1816	10
12 U.S.C. 1828(c)	10
26 U.S.C. 1501	7
12 C.F.R. 265.2(f)(22)(xi)	10
26 C.F.R. 1.502-14(a)(1) (1976)	7

Miscellaneous:

The Federal Reserve System, Purposes and Functions (1974)	9
Hearings on Financial Institutions and the Nation's Economy (FINE)—Discussion Principles, before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Committee on Banking, Currency and Housing, Part III, 94th Cong., 1st and 2d Sess. (1975-1976)	12
Heller, *Handbook of Federal Bank Holding Company Law* (1976)	12
S. Rep. No. 196, 86th Cong., 1st Sess. (1959)	10
S. Rep. No. 1095, 84th Cong., 1st Sess. (1955)	12
S. Rep. No. 1179, 89th Cong., 2d Sess. (1966)	11

In the Supreme Court of the United States

OCTOBER TERM, 1977

No.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, PETITIONER

v.

FIRST LINCOLNWOOD CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Board of Governors of the Federal Reserve System, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on rehearing *en banc* (App. A, *infra*, pp. 1a-12a) is reported at 560 F.2d 258. The initial panel opinion of the court of appeals (App. C, *infra*, pp. 15a-32a) is reported

at 546 F.2d 718. The order of the Board of Governors of the Federal Reserve System (App. C, *infra*, pp. 24a-27a) is reprinted as an appendix to the initial panel opinion of the court of appeals and is reported at 62 Fed. Res. Bull. 153.

JURISDICTION

The judgment of the court of appeals on rehearing *en banc* (App. B, *infra*, pp. 13a-14a) was entered on July 13, 1977. On October 4, 1977, Mr. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 10, 1977, and on November 1, 1977, he further extended the time to and including December 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under Section 3 of the Bank Holding Company Act the Federal Reserve Board must approve an application to form a new bank holding company, even though it believes that the financial structure of the company would be unsound, unless it can find that formation of the company would cause or worsen unsound financial conditions in the bank.

STATUTE INVOLVED

Section 3 of the Bank Holding Company Act of 1956, 70 Stat. 134-135, as amended, 12 U.S.C. 1842, provides in pertinent part:

> (a) It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; * * *.
>
> * * * * *
>
> (c) The Board shall not approve—
>
> (1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

STATEMENT

1. Under Section 3(a) of the Bank Holding Company Act of 1956, 70 Stat. 134, as amended, 12 U.S.C. 1842(a), it is "unlawful, except with the prior approval of the Board [of Governors of the Federal Reserve System], * * * for any action to be taken that causes any company to become a bank holding company * * *."[1] In considering whether to approve an application for formation of a bank holding company, the Board "[i]n every case * * * shall take into consideration the financial and managerial resources and future prospects of the company * * * and the banks concerned, and the convenience and needs of the community to be served." Section 3(c) of the Act, as amended, 12 U.S.C. 1842(c).[2]

[1] A "bank holding company" is defined in Section 2(a) of the Act, as amended, 12 U.S.C. 1841(a), as "any company which has control over any bank [or] over any company that is or becomes a bank holding company * * *." "[A] company has control over a bank * * * if [*inter alia*] * * * the company * * * owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank * * *" (*ibid.*).

[2] Section 3(c) also directs that "[t]he Board shall not approve—(1) any acquisition or merger or consolidation * * * which would result in a monopoly, or which would be in furtherance of any * * * conspiracy to monopolize * * * the business of banking * * *, or (2) any other proposed acquisition or merger or consolidation * * * whose effect * * * may be substantially to lessen competition * * *, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

2. Respondent is a corporation organized under the laws of Illinois for the purpose of becoming a bank holding company through the acquisition of approximately 80 percent of the common stock of First National Bank of Lincolnwood (App. C, *infra*, pp. 18a, 24a). The acquisition would be effected by the transfer to respondent of shares in the Bank's common stock now held by individuals, in exchange for respondent's own securities and respondent's assumption of a debt of $3.7 million currently owed by those individuals and secured by their shares of the Bank's stock (*ibid.*).

Because the acquisition would cause respondent to become a bank holding company, it required the Board's approval under Section 3 of the Act. After considering, *inter alia*, the financial and managerial resources and future prospects of both respondent and the Bank, the Board denied approval of the acquisition (App. C, *infra*, pp. 24a-27a). The Board determined that the $3.7 million acquisition debt, which respondent proposed to service primarily through earnings of the Bank, would not permit "the financial flexibility necessary to meet [respondent's] annual debt service requirements while maintaining adequate capital at [the] Bank" (App. C, *infra*, p. 25a). The Board also was concerned that "the financial requirements imposed upon [respondent] as a result of the acquisition debt, and uncertainty as to the source of funds for [the] Bank's proposed capital injections,[3]

[3] In its order, the Board noted (App. C, *infra*, p. 25a) that the "Bank plans to augment its capital accounts through the

could prevent [respondent] from resolving any unforeseen problems that may arise at [the] Bank" (App. C, *infra*, pp. 25a-26a). The Board concluded, on the basis of these "banking factors, and other facts of record, * * * that it would not be in the public interest to approve the formation of a bank holding company with an initial debt structure that could result in the weakening of [the] Bank's overall financial condition" (App. C, *infra*, p. 26a).

3. Respondent petitioned to the United States Court of Appeals for the Seventh Circuit for review of the Board's order. See Section 9 of the Act, as amended, 12 U.S.C. 1848. A panel of the court of appeals, with one judge dissenting, affirmed, stating that "we have no difficulty in finding that there is substantial evidence to support the denial of [respondent's] application" (App. C, *infra*, p. 19a).

On rehearing *en banc*, however, the court of appeals set aside the Board's order (App. A, *infra*, pp. 1a-12a). The court reasoned that although "the Board is empowered to deny approval of a bank acquisition upon finding it not to be in the public interest for reasons other than an anticompetitive tendency * * *, the condition or tendency deemed not to be in the public interest must be caused or enhanced by the proposed transaction" (App. A, *infra*, p. 7a). The court ruled that the Board could not "consider questions of bank soundness and public need apart from how these would be altered by formation * * * of a bank holding company" (App. A, *infra*, p. 9a).

The court concluded that respondent's acquisition of the Bank would have no adverse effect on the bank's financial condition (App. A, *infra*, p. 10a). The court regarded respondent's assumption of a substantial indebtedness, even in light of the Bank's low capitalization, to be irrelevant, because the indebtedness was simply being shifted from the Bank's current individual shareholders. The acquisition, the court concluded, would not impair "the soundness of operation of the bank" (App. A, *infra*, p. 10a). To the contrary, the court expressed the view that "[t]he only identified effects of the acquisition [*i.e.*, the prospect of a tax savings,[4] and the proposed infusion of capital (see note 3, *supra*)] militate in favor of the acquisition" (App. A, *infra*, pp. 11a-12a). The court of appeals therefore remanded the matter to the Board for its approval of respondent's application unless "relevant circumstances * * * have changed" (App. A, *infra*, p. 12a).

---

sale of $1.1 million in equity capital and $1.0 million debt capital within three to six months of approval of [respondent's] application * * *."

[4] Because respondent would assume the $3.7 million debt of the individual shareholders, it would be able, by filing a consolidated tax return, to deduct interest on the debt against the Bank's earned income. Any resulting increase in funds to the Bank (potentially $130,000 in the first year, declining thereafter) would be available to respondent as tax free intercorporate dividends for servicing the debt (see App. C, *infra*, pp. 18a-19a). See 26 U.S.C. 1501; 26 C.F.R. 1.502-14(a)(1) (1976).

REASONS FOR GRANTING THE PETITION

1. This case presents an important question concerning the Board's authority to disapprove formation of bank holding companies. As required by Section 3 of the Bank Holding Company Act, the Board "[i]n every case [involving an application to form a bank holding company] * * * take[s] into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned * * *." The Board's practice has been to deny approval of such applications where the resources and prospects of the holding company or the bank do not meet certain standards.

The holding below upsets that practice by limiting the Board's authority to deny approval of such applications to cases in which the formation of a bank holding company would create or worsen adverse financial conditions in the bank. Since the transfer of ownership of a bank from individuals to a newly formed company is in itself not directly likely to have such results, this limitation on the Board's authority in effect renders the mandate of Section 3 of the Act meaningless in such cases. The court of appeals' holding requires the Board virtually to rubberstamp any decision of individual shareholders to restructure their ownership of a bank in the form of a holding company, without regard to the issues of financial and managerial soundness that Congress has instructed the Board to consider.

Bank holding companies control a substantial part of the banking industry,[5] and the standards set by the Board to govern formation of such companies have been effective in helping to maintain the integrity and stability of that segment of the industry. By adopting an improperly narrow construction of the Board's powers under Section 3, the court of appeals has wrongly impeded the Board's ability to safeguard the banking public against the formation of unsound bank holding companies.

The immediate effect of limiting the Board's authority to regulate the formation of bank holding companies may well be to encourage such companies to begin their corporate life with dangerously excessive amounts of debt. There are tax advantages to minimizing the amount of equity supplied by the individual shareholders and maximizing the amount of debt incurred by a holding company;[6] the decision below largely removes the regulatory restraints that previously have been imposed by the Board in order to ensure that the pursuit of those advantages did not threaten the public interest in the financial sta-

---

[5] As of December 31, 1973, banking subsidiaries of holding companies held 65.5 percent of all commercial deposits in the United States. *The Federal Reserve System, Purposes and Functions* 111 (1974).

[6] In addition to the advantages resulting from a holding company's assumption of its individual shareholders' own debts (see note 4, *supra*), there is the further potential advantage that a company's payment of interest on any debts it owes to its own shareholders would, unlike dividends, be deductible.

bility of the nation's banking system.[7] In these circumstances, this case warrants review despite the absence of a conflict among the circuits.

2. The court of appeals erred in holding that the Board may not "consider questions of bank soundness and public need apart from how these would be altered by formation * * * of a bank holding company" (App. A, *infra*, p. 9a). Section 3(c) of the Act is not so narrowly worded. The language of that provision contemplates a general assessment of the conditions and prospects of both the holding company and the bank concerned. If the Board assesses the condition and prospects unfavorably, as it did in this case, it may on that basis alone disapprove the formation of a holding company. The Board is not required to go further and find, as the court held, that the establishment of a holding company by itself would have an immediate negative impact on the bank.

The "financial and managerial resources and future prospects" of a bank or bank holding company are traditional "banking factors," which federal banking agencies are "accustomed to review[ing] and consider[ing]" in the exercise of their discretion in the field of bank supervision and regulation. S. Rep. No. 196, 86th Cong., 1st Sess. 21, 22-23 (1959); see, *e.g.*, 12 U.S.C. 1816 (federal deposit insurance); 12 U.S.C. 322 (membership in Federal Reserve System); 12 U.S.C. 1828(c) (bank mergers). Congress pro-

[7] The Board disfavors the formation of a bank holding company whose capital structures included more than 75 percent debt. See 12 C.F.R. 265.2(f)(22)(xi).

vided for administrative consideration of these banking factors in various contexts in an effort to promote, on a continuing basis, the soundness and good management of the banking system.[8] In particular, Congress adopted the Bank Holding Company Act "to permit [the Board], expert in banking matters, to explore and pass on the ramifications of a proposed

[8] The legislative history of the 1966 amendments to the Bank Holding Company Act demonstrate that Congress intended the Board to require holding companies to be financially sound and to enforce standards of soundness through the Board's authority to grant or deny approval for acquisition of a bank.

Prior to those amendments, Section 19 of the Banking Act of 1933, 48 Stat. 186, had required a bank holding company to obtain a voting permit from the Board as a prerequisite to voting a subsidiary bank's shares. In acting upon such application the Board was required to consider the financial condition of the bank holding company; and, upon obtaining a voting permit, the holding company became subject to examination by the Board and was required, *inter alia*, to maintain a prescribed reserve of readily marketable assets in order to provide for the replacement of capital and to cover losses in its subsidiary bank or banks.

Thus Congress explicitly had provided that a bank holding company should serve as a source of financial strength to its subsidiary bank. The 1966 amendments to the Bank Holding Company Act repealed the voting permit arrangement (80 Stat. 236), but only because it "serves no substantial purpose" in view of the authority granted to the Board by the Bank Holding Company Act to consider a holding company's financial resources. S. Rep. No. 1179, 89th Cong., 2d Sess. 12 (1966). In other words, Congress repealed the provisions in the Banking Act giving the Board authority to require holding companies affirmatively to enhance the financial resources of their subsidiary bank or banks only because, in Congress' view, it also had conferred that authority in the Bank Holding Company Act.

bank holding company arrangement." *Whitney National Bank* v. *New Orleans Bank*, 379 U.S. 411, 420. The legislative history of the Act shows that Congress expected bank holding companies to be a source of financial strength and stability for subsidiary banks. See, *e.g.*, S. Rep. No. 1095, 84th Cong., 1st Sess. 15 (1955).

Consistent with this congressional understanding, it has been the practice of the Board to require, as it did in this case, that "a bank holding company * * * provide a source of financial and managerial strength to its subsidiary bank(s)" (App. C, *infra*, p. 25a). See Heller, *Handbook of Federal Bank Holding Company Law* 129-138 (1976).[9] Accordingly, the Board repeatedly has denied applications for the formation of holding companies involving significant acquisition debt, where, as here,[10] the holding company could not demonstrate to the Board's satisfaction that it had the resources to service and retire the debt while at the same time fulfilling its responsibility to its subsidiary bank or banks.[11] The court of appeals should have deferred to the Board's longstanding interpretation of its authority under the Act. See, *e.g.*, *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *Udall* v. *Tallman*, 380 U.S. 1, 16.[12] Instead, the court engrafted

[9] We are advised by the Board that in almost 400 instances it has granted approval of a holding company's acquisition of a bank upon a commitment by the holding company to increase the bank's capital (see, *e.g.*, *Denver U.S. Bancorporation, Inc.*, 56 Fed. Res. Bull. 291 (1970); *Michigan National Corporation*, 58 Fed. Res. Bull. 804 (1972)), and that since 1970 such commitments have added almost $2 billion to the capital of the nation's banks. See Hearings on Financial Institutions and the Nation's Economy (FINE)—Discussion Principles before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Committee on Banking, Currency and Housing, Part III, 94th Cong., 1st and 2d Sess. 2403 (1975-1976).

[10] In this case, the Board specifically found (and the court of appeals did not disagree) that respondent would not have "the financial flexibility necessary to meet its annual debt service requirements while maintaining adequate capital at [the] Bank" (App. C, *infra*, p. 25a).

[11] See, *e.g.*, *Clayton Bancshares Corporation*, 50 Fed. Res. Bull. 1261 (1964); *Mid-Continent Bancorporation*, 52 Fed. Res. Bull. 198 (1966); *Midwest Bancorporation, Inc.*, 56 Fed. Res. Bull. 948 (1970); *First Sebanco, Inc.*, 57 Fed. Res. Bull. 687 (1971); *The Grand Banks Corporation*, 57 Fed. Res. Bull. 1003 (1971); *BHCo., Inc.*, 60 Fed. Res. Bull. 123 (1974); *Citizens Bancorporation*, 61 Fed. Res. Bull. 805 (1975); *Starbuck Bancshares, Inc.*, 62 Fed. Res. Bull. 450 (1976).

[12] The court of appeals believed that questions of "bank soundness" were "reserved to the Comptroller of the Currency * * *" (App. A, *infra*, p. 9a). But the court simply misunderstood the allocation of regulatory responsibilities between the Board and the Comptroller. Each is required independently to consider the adequacy of a bank's capital structure. Compare 12 U.S.C. 26 and 27 with 12 U.S.C. 1842(c). See also 12 U.S.C. 78, 377, 461, 371b, 301, 222, 248(a), 601, 1844 (relating to regulation and supervision of national banks by the Board independently of the Comptroller of the Currency). All national banks are required to be members of the Federal Reserve System, 12 U.S.C. 222, and are subject to examination by the Board, 12 U.S.C. 248(a). Under the Bank Holding Company Act, 12 U.S.C. 1844, all subsidiary banks of a bank holding company are expressly subject to examination by the Board.

The Comptroller advises the Board with respect to applications for the formation of bank holding companies (Section 3(b) of the Act, 12 U.S.C. 1842(b)), but the Board is not

onto Section 3 of the Act a limitation upon the Board's authority that is inconsistent with the statutory scheme and that would seriously impair the Board's ability to prevent the formation of bank holding companies that would weaken the country's banking system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

RONALD R. GLANCZ,
MARK N. MUTTERPERL,
Attorneys.

DECEMBER 1977.

---

required to follow the Comptroller's recommendation. Cf. *Whitney National Bank* v. *New Orleans Bank, supra,* 379 U.S. at 419.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1114

FIRST LINCOLNWOOD CORPORATION,
an Illinois Corporation, PETITIONER,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT.

Petition for Review of an Order of the
Federal Reserve System

ARGUED IN BANC APRIL 19, 1977—
DECIDED JULY 13, 1977

Before FAIRCHILD, *Chief Judge*, SWYGERT, CUMMINGS, PELL, SPRECHER, BAUER and WOOD, *Circuit Judges.*

The court has reheard the case *in banc.* We will avoid unnecessary repetition of the facts set forth in the panel opinion.

The controlling statute is 12 U.S.C. § 1842(c):

> The Board shall not approve—
>
> (1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country will be substantially to lessen competition, or to tend to create a monopoly, or which in any manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transactions are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

The standards set forth in (1) and (2) relate to the question whether a proposed bank holding company structure will tend toward the lessening of competition, and it is clear from the legislative history that Congress' principal concern in regulating the acquisition of banks by bank holding companies is

with the anticompetitive potential. Thus in the 1956 Senate Report on the Act it was noted:

> . . . the principal problems in the bank holding company field arise from two circumstances: (1) The unrestricted ability of a bank holding company group to add to the number of its banking units, making possible the concentration of commercial bank facilities in a particular area under a single control and management; and
> (2) The combination under single control of both banking and non-banking enterprises, permitting departure from the principle that banking institutions should not engage in business wholly unrelated to banking.

See S. Rep. No. 1095, 84th Cong., 2d Sess., *reprinted in* [1956] U.S. Code Cong. & Ad. News 2482, 2483. The Senate Report accompanying the 1966 amendments to the Bank Holding Company Act also noted that the purpose of the Act was "to apply in the field of banking and bank holding companies the general purposes of the antitrust laws—to promote competition and to prevent monopoly, and the general purposes of the Glass-Steagall Act of 1933—to prevent unduly extensive connections between banking and other businesses." *See* S. Rep. No. 1179, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 2385, 2386. And the Senate Report accompanying the 1970 amendments continued to describe the Act as one regulating the "ability of . . . a [bank holding] company to obtain banking units, thereby concentrating the commercial bank facilities in a particular area under a single control" and "the

combination, again under a single control, of banking and non-banking enterprises." *See* S. Rep. No. 91-1484, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 5519, 5520.

We have no doubt that considerable deference must be accorded to a determination by the Board that a particular acquisition will have an anticompetitive tendency proscribed in (1) or (2). This court has upheld such decisions in cases where it was contended or even found that the considerations other than the anticompetitive factors militated in favor of the proposed acquisition. *First Wisconsin Bankshares Corp.* v. *Board of Governors*, 325 F.2d 946 (7th Cir. 1963); *Marine Corporation* v. *Board of Governors of Fed. Res. Sys.*, 325 F.2d 960 (7th Cir. 1963).

The question in this case, however, goes to the standard which governs the Board where no anticompetitive tendency is present, and the court must look only to the unnumbered paragraph at the end of the subsection. How broad is the Board's discretion to deny approval under those circumstances?

The Board's order denying approval is set out in an Appendix to the panel decision, 546 F.2d at 7. It is clear that "the proposed bank holding company formation is essentially a restructuring of the ownership interests of Bank," and "essentially a transfer of Bank's ownership from individuals to a corporation owned by the same individuals," and "would not eliminate any significant existing competition nor foreclose potential competition, increase the concentration of banking resources, or have any adverse

effect upon competition within the relevant banking market."

Thus the express standards for disapproval in paragraphs (1) and (2) were not fulfilled. The Board, however, apparently concludes that the unnumbered final sentence of § 1842(c) implies a "public interest" standard with respect to the financial and managerial resources and future prospects of the company or companies and the banks concerned and the convenience and needs of the community to be served. Because of the Board's concern over the $3.7 million indebtedness to which First Lincolnwood will be subject after acquiring the Bank's stock, and limitations upon First Lincolnwood's ability to resolve "any unforeseen problems that may arise at Bank," the Board deemed the proposal not in the public interest.

Because Congress required "consideration" of financial and managerial resources, future prospects, and convenience and needs of the community, it may well have intended that the Board disapprove an acquisition which would adversely affect the public interest vis-à-vis those considerations, even where no anticompetitive tendency is apparent.

As originally enacted, the general language regarding the consideration of soundness and community welfare was clearly not a mere modifier of the language dealing with anticompetitive effect. In 1956, § 1842(c) read as follows:

> In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration

> the following factors: (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

See The Bank Holding Company Act of 1956, Pub. L. No. 511, Sec. 3(c), *reprinted in* [1956] U.S. Code Cong. &. Ad. News 169, 171. In 1966 the language was amended to its present form, *see* An Act to Amend the Bank Holding Company Act of 1956. Pub. L. No. 89-485, Sec. 7(c), *reprinted in* [1966] U.S. Code Cong. & Ad. News 265, 267 (codified at 12 U.S.C. § 1842(c)). Except for adding emphasis to the anticompetitive considerations and specifying the possibility that convenience and necessity may outweigh an anticompetitive tendency, the change to the present form of (c) does not appear to have significantly changed the substance. The reports indicate the change in language came in order to conform the standards of Board review in bank holding company cases to those used in bank merger cases. *See* S. Rep. No. 1179, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 2385, 2393. *See also* that portion of the Bank Merger Act, 12 U.S.C. § 1828(c)(5), which is identical to section 1842(c)

of the Bank Holding Company Act. From the legislative history of the Bank Merger Act, we learn that Congress wanted the Board to consider matters not strictly related to competitive effect, so that on those few occasions when a community would be greatly benefited by a bank holding company's operation, such benefits would not be denied simply because the Board, tied to a strict competitive analysis, felt itself obliged to deny approval of the holding company. *See* S. Rep. 1221, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 1860, 1863.

Thus we conclude that the Board is empowered to deny approval of a bank acquisition upon finding it not to be in the public interest for reasons other than an anticompetitive tendency.

What we think the Board has overlooked here is the logic that, in order to be grounds for disapproval, the condition or tendency deemed not to be in the public interest must be caused or enhanced by the proposed transaction. Here the concern of the Board is the amount of indebtedness to be assumed by the corporate owner of the Bank. Yet the individual present owners are obliged in the same amount. The indebtedness already exists, as well as the substantial capitalization of the Bank. The proposed transaction will not create nor increase the debt, nor increase any danger it poses to the soundness of the Bank. The only changes identified as resulting from the proposed transaction are a tax advantage which will make it possible to speed the reduction of the debt, and a proposed addition to Bank capital which will alleviate the

other concern. Both changes are favorable to the public interest, although they do not guarantee as much of an improvement as the Board would like.

The Board assumes the stance that the tax advantage of bank holding company status is a reward which it may withhold until the applicant's financial status fulfills the Board's standard of desirability. We do not find this power or breadth of discretion in the statute.

In considering the scope of the Board's discretion to deny bank holding company status pursuant to the last sentence of 12 U.S.C. § 1842(c), we have been mindful of the fact that as originally enacted, the Bank Holding Company Act empowered the Federal Reserve Board to regulate only those holding companies that exercised control over *two* or more banks. *See* Bank Holding Company Act of 1956, Pub. L. No. 511, Section 2(a), *reprinted in* [1956] U.S. Code Cong. & Ad.News 169.[1] In this light, we construe the language about considering financial soundness and community convenience to represent congressional thought that corporate control over two or more banks might have effects unrelated to competition, but nevertheless appropriate for consideration. Weakness of a bank to be acquired might be a reason in the public interest for allowing it to be owned by a strong hold-

[1] We note that when in 1966 the Bank Holding Company Act was amended to include section 1842(c) as we now know it, the power of the Federal Reserve Board over bank holding companies was still limited to those companies exercising control over two or more banks.

ing company, and to be balanced as a factor in favor of the acquisition and perhaps outweighing a concern over a possibility that competition might be decreased. Or under some circumstances its weakness might be deemed a reason for not burdening an existing holding company system. It seems reasonable then that Congress intended the Federal Reserve Board to withhold its approval where the formation or enlargement of the holding company structure would cause or tend to cause undesirable effects in terms of financial soundness and service. But, we do not find any indication that Congress meant the Board to go beyond this inquiry, and to consider questions of bank soundness and public need apart from how these would be altered by formation or enlargement of a bank holding company. These matters were already reserved to the Comptroller of the Currency in the case of national banks, or to various state agencies in the case of local banks.

Nothing in the history of the 1970 amendment to the Act which extended Board control to one-bank holding companies indicates any intent by Congress to alter this scheme. Indeed, it seems the primary reason for extending the coverage of the Act was the belief that the large growth in assets held by one-bank holding companies made it as necessary to remove the danger that a one-bank holding company "might misuse or abuse the resources of a bank it controls in order to gain an advantage in the operation of a nonbanking activity" as it originally had been to remove the danger that multi-bank holding

companies might so misuse resources. *See generally* S. Rep. No. 91-1084, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 5519, 5520-22. In short, it seems Congress' concern in extending the coverage of the Act to one-bank holding companies was more with bringing such companies under the limits of 12 U.S.C. § 1843[2] than with suggesting any broadening of Board discretion pursuant to section 1842(c). Accordingly, we conclude that the scope of Board discretion with respect to one-bank holding companies is identical to its discretion with respect to multi-bank holding companies: the Board can withhold approval of an acquisition whenever it is of the opinion that formation or enlargement of the holding company will result in effects harmful to competition, to the financial resources of the banks involved or to the needs and convenience of the communities to be served.

We reject then the Board's position that the general language of section 1842(c) either requires or authorizes it to withhold its approval where, as here, the soundness of operation of the bank involved is not adversely affected by the formation of a bank holding company.[3] The soundness of the First Na-

[2] 12 U.S.C. § 1843 provides, in pertinent part, that, (a) Except as otherwise provided in this chapter, no bank holding company shall—

> (1) After May 9, 1956, acquire direct or indirect ownership or control of any voting shares of any company which is not a bank. . . .

[3] As the Board conceded on oral argument to the original panel that heard this case, operation of the First National Bank of Lincolnwood through a one-bank holding company might in fact be financially sounder as a result of approximately $130,000 in annual tax savings that would be possible because of the opportunity to file a consolidated tax return.

tional Bank of Lincolnwood, except as adversely affected by the formation of a bank holding company, is a matter for the Comptroller of the Currency. Only he has the real power to protect the public from unsound national banking institutions, *i.e.*, by revoking their certificate to do banking. In contrast, a denial of one-bank holding company status to a corporation desiring to hold the stock of one bank on grounds that the bank involved has financial problems does little, if anything, to protect the public. The denial does not prevent the bank from continuing operation. It does not signal the public that it should be wary of dealing with the bank in question. In this case, the record indicates that the Comptroller of the Currency has considered the capitalization ratio of the First National Bank of Lincolnwood and, after the bank agreed to some changes in the proposal, recommended approval.[4]

The Board has not identified any undesirable effect or tendency which would be reasonably expected to be produced by the proposed acquisition. The low capitalization ratio and the debt of its stockholders already exist. The only identified effects of the ac-

[4] Pursuant to 12 U.S.C. § 1842(b), the Comptroller of the Currency must review and make recommendations whenever a bank holding company applicant would control a national bank.

quisition, the tax saving, and the infusion of capital, militate in favor of the acquisition. Thus the Board erred in denying approval. We do not order approval, only because there has been a delay of sufficient extent that relevant circumstances may have changed.[5]

The Board's denial of approval of the acquisition of the Bank and First Lincolnwood is set aside, and the cause is remanded to the Board for proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for
the Seventh Circuit

[5] The panel rejected contentions of First Lincolnwood relating to the ninety-day period for approval of a bank holding company, 12 U.S.C. § 1842(b), and the Board's forty-five day approval regulation, 12 C.F.R. 225.3(b) (1976). First Lincolnwood did not seek rehearing as to those contentions, and as to them, the decision of the panel controls.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

July 13, 1977

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

No. 76-1114

FIRST LINCOLNWOOD CORPORATION,
an Illinois Corporation, PETITIONER,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE
SYSTEM, RESPONDENT.

Petition for Review of an Order of the
Federal Reserve System

Note: The Honorable Philip W. Tone did not participate in the consideration or decision of this appeal.

This cause came on to be heard on the transcript of the record from the Board of Governors of the Federal Reserve System and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the Board of Governors of the Federal Reserve System is SET ASIDE, and the cause is REMANDED to the Board for proceedings consistent with the opinion of this court filed this date.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1114

FIRST LINCOLNWOOD CORPORATION, PETITIONER,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT.

Petition to Review an Order of the Board of Governors of the Federal Reserve System

---

ARGUED OCTOBER 22, 1976—

DECIDED DECEMBER 7, 1976

Before CLARK, *Associate Justice* (Retired),* FAIRCHILD, *Chief Judge*, and HASTINGS, *Senior Circuit Judge*.

Petitioner seeks review of an order of respondent Board of Governors of the Federal Reserve System

---

* The Honorable Tom C. Clark, Associate Justice, Supreme Court of the United States, Retired, is sitting by designation.

(Board or Federal Reserve Board), issued January 9, 1976, denying, on financial grounds, the application of First Lincolnwood to acquire the Bank.

The application was filed with the Federal Reserve Board pursuant to the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-1848, as amended (the Act), which makes it unlawful for a company to acquire control of a bank without first obtaining prior approval of the Board.

Section 1842(c) of the Act prescribes that in determining whether to approve an application, the Board is required to consider "the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served," as well as the competitive effects of the proposed transaction.

Section 1842(b) of the Act prescribes the following time limitation for Board consideration of an application to acquire control of a bank:

> In the event of the failure of the Board to act on any application for approval under this section within the ninety-one day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted.

Section 1848 of the Act provides that "[a]ny party aggrieved by an order of the Board" may petition for review in a United States Court of Appeals, and that "[t]he findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive."

THE ISSUES ON PETITION FOR REVIEW

1. Whether substantial evidence supports denial of petitioner's application to form a one-bank holding company on grounds of inadequate capitalization.
2. Whether the order of the Federal Reserve Board was issued within ninety-one days from the date of submission to the Board of the complete record on the application of the petitioner.
3. Whether the Federal Reserve Board complied with its own regulations governing applications for approval of the formation of a one-bank holding company.

BASIC FACTS

We first consider a statement of the basic facts and procedures underlying this petition for review.

On June 3, 1975, the Federal Reserve Bank of Chicago (Chicago Reserve Bank) accepted an application of First Lincolnwood to become a bank holding company through the acquisition of eighty per cent or more of the voting shares of the Bank. A voting trust controls the Bank through August 1, 1982.

A copy of the application was sent to the Comptroller of the Currency for his views and recommendations and to the Attorney General. The Attorney General did not respond. Notice of the application was also given to the several required federal and state agencies and was published in the Federal Register.

The Chicago Reserve Bank declined to exercise its

delegated authority to act on the application, but forwarded the application to the board for its consideration and action because of the current capital position of the bank and its unsatisfactory debt structure.

The Comptroller of the Currency first ruled adversely on the application but later reconsidered and voted favorably on it.

First Lincolnwood holding company is essentially a restructuring of the Bank's ownership whereby the ownership of the Bank will be shifted from individuals now owning somewhat over eighty per cent of the 144,375 shares of common stock authorized and outstanding, to a corporation owned by the same individuals, with no real change in control or management. The holding company intended to acquire the bank stock now held by the voting trust (eighty per cent would be required for tax purposes), and the holding company would also acquire by purchase $1,500,000 in additional bank stock within one year of completion of the transaction to further capitalize the Bank.

The real purpose of the acquisition is that the holding company would assume a debt of $3,700,000 owed by the Bank's principals to Central National Bank, secured by the Bank's stock, with an annual interest charge of $260,000. This would permit the filing of a consolidated tax return which, in turn, would allow this interest deduction to be taken against the earned income of the Bank, with an ultimate increase in

funds available to the Bank, as increased after tax earnings, of about $130,000.

The Bank had some early "adverse history" following the indictment of its then chairman and its former president in a case involving the manipulation of the stock on the American Stock Exchange. All parties now agree that the Bank's present management, headed by its chief executive officer, Mr. Harold Cohn, is outstanding and has converted the Bank to its now favorable condition.

Upon final consideration of the facts of record, the Federal Reserve Board denied the application. A copy of the Board's order is attached hereto as an Appendix to this opinion.

I

On the basis of our consideration of the record as a whole, together with the findings of the Board as set out in the attached Appendix, we have no difficulty in finding that there is substantial evidence to support the denial of petitioner's application.

The basic guidelines for consideration of this precise question are to be found in two thoroughly considered opinions authored by Judge Swygert of our court, *First Wisconsin Bankshares Corp.* v. *Board of Governors of the Federal Reserve System*, 7 Cir., 325 F.2d 946 (1963), and *Marine Corp.* v. *Board of Governors of the Federal Reserve System*, 7 Cir., 325 F.2d 960 (1963). We find these two cases to be dispositive of the first issue on this petition for review.

II

We find Judge Pell's opinion in *Tri-State Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, 7 Cir., 524 F.2d 562 (1975), to be instructive on the date the ninety-one day period begins to run in order to determine whether the application for approval of a bank holding company shall be deemed to have been granted. We have earlier herein set out the provisions of 12 U.S.C. § 1842(b).

In *Tri-State*, the court regarded the principal issue as being the proper construction of the statutory phrase "complete record." After reviewing the legislative history of the Act and various tangential decisions, the court held "that the 91-day period of § 1842 (b) begins to run when the final material needed for the Fed's decision is received from the various interested sources outside the Fed, which ordinarily would be the applicant and governmental agencies other than the Fed. * * * [I]t is our view that the Congressional intent here was to define 'complete record' as meaning the facts upon which the agency would pass, not the internal documents relating to the process of that passing." 524 F.2d at 566.

Further, the court in *Tri-State* said: "The holding we have reached in this case, of course, does not mean that the submission of the complete record has occurred when the decisional process develops the need for further information which is thereupon requested. The completion of the record status is not reached until all factual data from external sources neces-

sary for the decision has been actually submitted to the Fed." 524 F.2d at 567.

We are in accord with the holding in *Tri-State* that the ninety-one day period does not start to run until the final material needed for the Board's decision is received from various interested sources outside the Board. In the instant case the Board's action on January 9, 1976, was well within ninety-one days of the last submission to it by First Lincolnwood on November 8, 1975, of the third quarter financial statements of the Bank. This was completely relevant and necessary as the basis for calculation of the Bank's invested asset ratios which support the Board's denial. First Lincolnwood acquiesced completely in furnishing the third quarter figures.

First Lincolnwood argues that the ninety-one day period ran from the date of acceptance of its application by the Reserve Bank of Chicago. This is unrealistic and in conflict with *Tri-State*. Likewise, we find no merit in First Lincolnwood's attempt to extend the holding in *Tri-State* by contending that a submission, in order to be deemed necessary to a Board decision, must be noted in the Board's order in order for the submission to mark the start of the ninety-one day period.

We have considered other contentions of First Lincolnwood on the ninety-one day time limitation period and are not persuaded by them.

We hold, therefore, that under the facts of this case, the Board acted within ninety-one days of the

submission of the complete record on the First Lincolnwood application.

III

Finally, First Lincolnwood contends that the Federal Reserve Board failed to comply with its own regulations for the approval of the formation of a one-bank holding corporation.

Under the Board's appropriate regulation concerning this issue, it is provided that:

> Any application for the Board's approval of the formation of a company that controls only one bank shall be deemed to be approved forty-five days after the company has been informed by its Reserve Bank that said application has been accepted, *unless the company is notified to the contrary within that time* or is granted approval at an earlier date. (Emphasis added.)

12 C.F.R. 225.3(b) (1976).

The record on review establishes that petitioner was notified on June 3, 1975 (seventeen days after the filing of its application), that the forty-five day period would not apply, and that its application would be forwarded to the Board for action, in lieu of action by the Chicago Reserve Bank under delegated authority.

By letter dated June 3, 1975, the Reserve Bank informed Mr. Harold Cohn, President of First Lincolnwood, that First Lincolnwood's application was accepted as of that date. The letter informed Mr. Cohn that the application would require action by the Federal Reserve Board because of the capital position of the Bank and, accordingly, that "[i]n view of the factors involved in this transaction, the 45-day period as provided in Section 225.3(b) of the Board of Governors' Regulation Y is hereby suspended."

This letter received by Mr. Cohn appears to be dispositive of this issue on review. The Board fully complied with its own regulation.

In sum, based on the foregoing, together with the order of the Board, as set out in the Appendix hereto, which we fully approve, the order of the Federal Reserve Board denying the application of First Lincolnwood is in all respects approved and affirmed.

AFFIRMED—REVIEW DENIED.

APPENDIX

FEDERAL RESERVE SYSTEM
FIRST LINCONWOOD CORP.

Order Denying Formation of Bank Holding Company

First Lincolnwood Corp., Lincolnwood, Illinois, has applied for the Board's approval under § 3(a)(1) of the Bank Holding Company Act [12 U.S.C. § 1842 (a)(1)] of formation of a bank holding company through acquisition of 80 per cent or more of the voting shares of The First National Bank of Lincolnwood, Lincolnwood, Illinois ("Bank").

Notice of the application, affording opportunity for interested persons to submit comments and views, has been given in accordance with § 3(b) of the Act. The time for filing comments and views has expired, and the Board has considered the application and all Comments received, including those submitted by the Comptroller of the Currency, in light of the factors set forth in § 3(c) of the Act [12 U.S.C. § 1842(c)].

Applicant is a non-operating corporation organized under the laws of Illinois for the purpose of becoming a bank holding company through the acquisition of Bank. With deposits of $65.7 million, Bank holds approximately two-tenths of one per cent of the total deposits held by commercial banks in the relevant banking market (approximated by the Chicago area) and is the 67th largest of the market's 286 banks.[1] Inasmuch as this proposal represents essentially a

[1] All banking data are as of December 31, 1974, unless otherwise indicated.

transfer of Bank's ownership from individuals to a corporation owned by the same individuals, and Applicant has no present banking subsidiaries, the acquisition of Bank by Applicant would not eliminate any significant existing competition nor foreclose potential competition, increase the concentration of banking resources, or have any adverse effect upon competition within the relevant banking market. Accordingly, the Board concludes that competitive considerations are consistent with approval of the application.

The Board has indicated on previous occasions that a bank holding company should provide a source of financial and managerial strength to its subsidiary bank(s), and that the Board will examine closely the condition of the applicant in each case with this consideration in mind. In connection with this proposal, Applicant will incur acquisition debt of approximately $3.7 million, which debt Applicant proposes to service over a twelve-year period primarily through earnings of Bank. In the Board's view, the projected earnings of Applicant over the debt-retirement period appear to be somewhat optimistic in view of Bank's previous earnings record and, even if actually realized, would not provide Applicant with the financial flexibility necessary to meet its annual debt service requirements while maintaining adequate capital at Bank. Furthermore, although Applicant has stated that Bank plans to augment its capital accounts through the sale of $1.1 million in equity capital and $1.0 million debt capital within three to six months of approval of this application, the Board is concerned that the financial

requirements imposed upon Applicant as a result of the acquisition debt, and uncertainty as to the source of funds for Bank's proposed capital injections, could prevent Applicant from resolving any unforeseen problems that may arise at Bank. On the basis of the above banking factors, and other facts of record, the Board is of the view that it would not be in the public interest to approve the formation of a bank holding company with an initial debt structure that could result in the weakening of Bank's overall financial condition. Accordingly, the Board concludes that the considerations relating to the banking factors weigh against approval of the application.

As indicated above, the proposed bank holding company formation is essentially a restructuring of the ownership interests of Bank without any significant changes in Bank's operations or the services offered to customers of Bank. Consequently, considerations relating to the convenience and needs of the community to be served are consistent with, but do not lend weight toward, approval of the application.

On the basis of all of the circumstances concerning this application, the Board concludes that the banking considerations involved in the proposal present adverse factors bearing upon the financial conditions and future prospects of both Applicant and Bank. Such adverse factors are not outweighed by any procompetitive effects or by benefits to the convenience and needs of the relevant community. Accordingly, it is the Board's judgment that approval of the applica-

tion would not be in the public interest and that the application should be denied.

On the basis of the facts of record, the application is denied for the reasons summarized above.

By order of the Board of Governors,[2] effective[3] January 9, 1976.[4]

(Signed) Theodore E. Allison
THEODORE E. ALLISON
Secretary of the Board

[SEAL]

---

[2] Voting for this action: Vice Chairman Mitchell and Governors Bucher, Holland, Wallich, Caldwell, and Jackson. Absent and not voting: Chairman Burns.

[3] Board action was taken while Governor Bucher was a Board member.

[4] Board action was taken before Governor Partee became a Board member.

FAIRCHILD, *Chief Judge*, dissenting in part. The facts in this case fail to show any greater risk to the financial structure of the bank in question or to the community which it serves if a bank holding company is formed than if present private ownership continues. Accordingly, I respectfully dissent from the court's resolution of the first issue in this case.

The Board's denial of appellant's application to form a holding company is based on its finding of an unfavorable ratio of debt to capital in the proposed holding company's financial structure. But, as the parties agree, this debt/capital ratio would by no means result from the creation of the proposed holding company. It is a present fact of the bank's existence that must be coped with whether the bank is privately or publicly owned.[1] On oral argument, counsel for the Board twice admitted that there would be practically no realistic difference in the financial operation of the bank whether it was owned by private individuals or allowed to operate through a bank holding company. Indeed, counsel went on to concede that operation under a bank holding company might be financially sounder in the instant case as a result of approxi-

[1] The present debt was incurred by the owners of the bank in order to buy out the shares of the former Chairman of the Board. He was under indictment in a case involving stock manipulation, and this, together with other factors, had caused severe financial losses to the bank. Present management is trying to recoup these losses and restore the bank to a financially sound position. This is clear from the Federal Reserve Board of Chicago Report on the application of the First Lincolnwood Corporation and is undisputed.

mately $130,000 in annual tax savings that would be possible because of the opportunity to file a consolidated tax return.

Nevertheless, the Board's position is that it is empowered to deny bank holding company status whenever it is unsatisfied with a bank's financial structure, regardless of whether the risks of that structure exist to the same, or even to a greater, degree under private ownership. The Board cites as the source of authority for its exercise of this power the last sentence of 12 U.S.C. § 1842(c) which provides that "in every case [in which application as a holding company is being made] the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served."

The critical issue as we see it, however, is whether this statute either empowers or requires the Board to deny the application unless persuaded that the bank's capability will be strengthened and its future prospects and servicing of the convenience and needs of the community positively improved by formation of a bank holding company (and that the improvement will be to a degree satisfactory to the Board), or whether the Board must be able to point to some increase of financial risk, some threat of injury to the community, which will ensue if a holding company is formed.

We believe the Board to have the burden. We draw this conclusion from our understanding of the Bank Holding Company Act. Its main thrust is not to avoid

all bank holding companies as financial structures risky in and of themselves, making an exception only when the applicant can promise some public benefit. Its thrust is to avoid those structures which will create anticompetitive risks so that the public interest demands their proscription.[2] Thus, the form of two numbered provisions, which are the heart of 12 U.S.C. § 1842(c), indicates that it is not the applicant who is required to show that the proposed holding company will promote competition, in order to obtain approval, but rather the Board that must find evidence of anti-competitive effect in order to deny.[3]

---

[2] In its report the Senate Committee responsible for the Bank Holding Company Act stated that it was ". . . not the committee's contention that bank holding companies are evil of themselves. However, because of the importance of the banking system to the national economy, adequate safeguards should be provided against undue concentration of control of banking activities." S. Rep. No. 1095, 84th Cong., 2d Sess. *reprinted in* [1956] U.S. Code Cong. & Ad. News, 2d Sess., *see also* S. Rep. No. 91-1084, 91st Cong., 2d Sess. *reprinted in* [1970] U.S. Code Cong. & Ad. News 5519, 5520 (indicating the same Congressional concerns in amending the Act to include one-bank holding companies).

[3] 12 U.S.C. § 1842(c) provides:

> The Board shall not approve—
>
> (1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country will be substantially to lessen competition, or to tend to create a monopoly, or which in any manner would be in restraint or trade, unless it finds that the anticompetitive effects of the proposed transactions are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

From this, we conclude that in those cases arising under the more general language of the last sentence of 12 U.S.C. § 1842(c), it is likewise necessary for the Board to support a denial of holding company status by pointing to some risk, either to the financial structure of the bank itself, or to the community which it serves, that would attend formation of a bank holding company and that would not be present under the current ownership. The Board has not done this.

Though our inclination ordinarily would be to defer to the Board's expertise in judging what risks attending the formation of a bank holding company warrant denial of that status,[4] when the Board has not indi-

---

[4] The majority cites two cases as evidence of the deference this court has generally shown decisions of the Federal Reserve Board on applications for holding company status. *See First Wisconsin Bankshares Corp.* v. *Board of Governors of the Federal Reserve System*, 325 F.2d 946 (7th Cir. 1963); *Marine Corp.* v. *Board of Governors of the Federal Reserve System*, 325 F.2d 960 (1963). But in both these cases, the Board reported on anti-competitive effects that would result from the acquisition of the banks in question by holding companies. In the instant case, the Board concedes that no anti-competitive effects, or indeed, any adverse effects will be directly attributable to the formation of the proposed holding company.

cated its finding of any increase in risk either in its denial statement or in the brief filed with this court, and when it in fact has admitted on oral argument that no greater risk is posed by the formation of a holding company in this case than already exists under private ownership, there is, in my opinion, insufficient support for the denial. I would reverse.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for
the Seventh Circuit

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 251358 105